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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

FLORIDA TILE COMPANY,
DIVISION OF SIKES CORPORATION,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION OF FLORIDA TILE COMPANY FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether, to avoid a finding of "discrimination" under Section 8(a)(3) of the National Labor Relations Act, 29 U.S.C. 158(a)(3), an employer that produces evidence of legitimate, non-discriminatory business reasons justifying the discharge of an employee must also prove, by a preponderance of the evidence, that those legitimate reasons do not mask an impermissible purpose and that it relied on those legitimate reasons in discharging that employee.

2. Whether the confusion generated by the National Labor Relations Board and the different approaches taken by the circuit courts of appeal in construing the burden of proof allocation in Section 8(a)(3) cases necessitates the granting of this petition for a writ of certiorari in light of this Court's pending decision in *NLRB* v. *Transportation Management Corp.* (No. 82-168).

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NATIONAL LABOR RELATIONS BOARD,
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PETITION OF FLORIDA TILE COMPANY FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner, Florida Tile Company ("Florida Tile"), respectfully prays that a writ of certiorari issue for review of the judgment of the United States Court of Appeals for the Sixth Circuit entered in this proceeding on November 2, 1982.

OPINIONS BELOW

The order and opinion of the court of appeals (App. A, *infra*, 1a - 2a) is officially reported at 692 F.2d 34 and is unofficially reported at 112 L.R.R.M. (BNA) 2540 and 96 Lab. Cas. (CCH) ¶ 14,009. The decision and order of the National Labor Relations Board (App. B., *infra*, 3a - 4a) and the decision of the Administrative Law Judge (App. C, *infra*, 5a - 21a) are reported at 255 N.L.R.B. 360. They are also referenced in 106 L.R.R.M. (BNA) 1461 and 1980-81 NLRB Dec. (CCH) ¶ 17,973.

JURISDICTION

The judgment of the court of appeals was entered on November 2, 1982. Florida Tile's timely petition for rehearing and suggestion for hearing *en banc* was denied on February 7, 1983 (App. D., *infra*, 22a). This Petition is filed within ninety days of said Order. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 7 of the National Labor Relations Act, 29 U.S.C. § 157, provides in part:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection * * * .

Section 8(a) of the National Labor Relations Act, 29 U.S.C. § 158(a), provides in part:

> It shall be an unfair labor practice for an employer (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7 of this title;
>
> * * *
>
> (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization * * * .

Section 10(c) of the National Labor Relations Act, 29 U.S.C. § 160(c), provides in part:

> * * * If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaged in any such unfair labor practice, then the

> Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this [Act]: * * * No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause * * *.

STATEMENT OF THE CASE

1. Petitioner, Florida Tile, is engaged in the manufacture and distribution of tile at its Lawrenceburg, Kentucky facility (App. C, *infra*, 6a). It employs approximately three hundred people there (JA-67).[1]

Connie Beavers was employed by Florida Tile as a sorter of tiles from November 12, 1977, until her termination on March 23, 1979 (*ibid.*). The questions presented in this proceeding emanate from the events surrounding Beavers' termination.

Florida Tile has a long-standing company policy requiring the automatic termination of any and all employees receiving three written warnings within a twelve-month period (App. A, *infra*, 1a-2a; App. C, *infra*, 12a n.8, 13a). On January 31, 1979, Beavers received a written warning for excessive absenteeism (App. C, *infra*, 12a n.8). This first warning had nothing to do with union activity, as Beavers herself admitted (App. C, *infra*, 13a n.8; *see* App. A, *infra*, 2a).[2]

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[1] "JA" references are to the joint appendix lodged in the court of appeals.

[2] This written warning occurred shortly after two separate incidents in November and December 1978 in which Beavers had been

A union organizational drive began at Florida Tile's plant in January, 1979 (App. C, *infra*, 6a). Beavers was one of several employees who supported the union (App. A, *infra*, 1a; App. C, *infra*, 7a).

On Monday, March 19, 1979—at least two months after the union began to organize—Beavers concluded her shift at 4:30 A.M. and went to the women's locker room where she attempted to persuade one of her co-workers, Pat Humphrey, to sign a union authorization card (App. C, *infra*, 7a). Humphrey started to sign the card when a third employee, Joan Newton, walked into the locker room *(ibid.)*. Newton asked Humphrey whether she really wanted to sign the card *(ibid.)*. Newton indicated she herself would not sign a union authorization card *(ibid.)*. Humphrey then said she did not "really want to" sign the card either *(ibid.)*.

Faced with Newton's intercession and Humphrey's retraction of her apparent willingness to sign a union authorization card, Beavers became angry and loud (JA-197). At Beavers' instigation, a "confrontation" ensued between Beavers and Humphrey during which Beavers, using profanity, berated Humphrey for allegedly allowing Newton to influence her decision not to sign the card.[3]

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reproached about her "lack of respect and contempt" for her co-workers (JA-528) and "her continued bad approach to the company and her effects on her fellow employees" (JA-529). In the latter instance, Beavers was advised that "the next case of attitude problem [would result] in more severe" disciplinary action (JA-529). There is no contention that these 1978 warnings were in any way related to union activity.

[3] As described by Pat Humphrey and corroborated by Joan Newton, Beavers said, "Pat, do you tell Joan who to—who to fuck, who, when, where, and how" (App. C, *infra*, 7a). Before the confrontation ended, Beavers told Humphrey to let Newton run her "fucking life"; she left the locker room by calling both Humphrey and Newton

Witnesses to the Beavers-Humphrey confrontation uniformly agreed that, while profanity was not uncommon in and around the plant, they had never before heard profanity directed at someone in the manner in which Beavers addressed Humphrey (App. C, *infra*, 9a-10a; JA-399-400, 425, 440, 535).

On the evening of March 19, Beavers, Humphrey, and Newton went to work on their assigned shift (App. C, *infra*, 10a).[4] During this shift, Florida Tile management, responding to complaints from Humphrey and Newton, began to investigate the locker room incident that had occurred at the end of the previous shift (App. C, *infra*, 10a; JA-363-364). Both Humphrey and Newton left their work assignments during the evening shift to discuss their encounter with Beavers (App. C, *infra*, 10a; JA-85, 364).

Meanwhile, Beavers, by her own admission, had begun work on the evening shift by complaining about the particular job to which she had been assigned in comparison to the jobs to which Humphrey and Newton had been assigned (JA-82-85).[5] Beavers then saw Newton and Humphrey leave the shift to talk to their supervisor (JA-85). Believing that her work assignment and the

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"dumb bitches—or damn bitches, something about bitches" (App. C, *infra*, 8a). The Administrative Law Judge found that Newton responded to Beavers by saying "Oh, Connie, shut your fucking mouth" (App. C, *infra*, 9a).

[4] Although Newton and Humphrey were scheduled to pick up Beavers and drive her to work on the evening of March 19, Newton and Humphrey did not pick her up and Beavers drove herself to work (App. C, *infra*, 9a).

[5] Newton and Humphrey were assigned to regrade tile at the start of the shift—a job considered by Beavers to be easier than the "line" she was working on that night (JA-83).

absence of Newton and Humphrey from the shift was caused by the previous shift's confrontation (JA-85), Beavers then told the employees working next to her that "people who go tell about the Union and 'stuff like that ought to have their butt kicked' " (App. C, *infra*, 11a). Beavers also told these employees that Humphrey was " 'playing up to another male employee, but would not let him kiss her' " (App. C, *infra*, 12a). Beavers then said she " 'wouldn't touch Pat Humphrey with a 10-foot pole because she was scared she [Humphrey] might have VD' " (App. C, *infra*, 11a). Beavers, conceded, however, that she did not know whether Humphrey in fact had VD and was just making these statements "to be hateful" (JA-151).[6]

During the week of March 19, Florida Tile conducted an investigation of both the locker-room confrontation between Beavers and Humphrey and the statements made by Beavers during the night shift of March 19 (App. C, *infra*, 10a-12a, 16a). Based on the totality of the available evidence, including statements of both pro- and anti-union witnesses present at both incidents and Beavers' own statements about the incidents, Florida Tile determined that Beavers should receive two warning slips—one for each incident (App. C, *infra*, 11a-12a).[7] The first

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[6] Beavers also called Humphrey and Newton "whores" and "sluts" during this interchange (JA-123, 346).

[7] The warning slips were drawn up during the week of the investigation in anticipation of a meeting between Florida Tile management and Beavers on Friday, March 23 (App. C, *infra*, 11a). Such a meeting with Beavers did occur on Friday, March 23 (*ibid.*). Florida Tile's production supervisor told Beavers during the meeting that if she could produce evidence "that she did not do what she was accused of, the written warnings would be torn up. . ." (App. C, *infra*, 12a). Beavers did not produce such contrary evidence, simply stating that "you've already had your mind made up to fire me before you even heard my side of the story" (App. C, *infra*, 11a).

warning arising out of the locker-room incident was given for "harrassing and badgering another employee. . ." (App. A, *infra*, 2a; App. C, *infra*, 11a, 15a; JA-519). The second warning arising out of the events of the night shift was given for "making vicious and malicious statements about a fellow employee. . ." (App. A, *infra*, 2a; App. C, *infra*, 11a, 15a; JA-520).

At all times during the investigation, Florida Tile was aware that any discipline given to Beavers might be subject to misinterpretation because Beavers was a union advocate (JA-66, 563). Pursuant to the company's normal practice and to ensure that the discipline incurred by Beavers was fair and based solely on the operative facts without regard to the employee's union activity, Florida Tile's Executive Vice President of Personnel was consulted (JA-61). He concurred in the decision to issue two warning slips *(ibid.)*. .

The combination of the two warning slips received by Beavers and the previous warning she had received for excessive absenteeism meant that Beavers was subject to automatic discharge under company policy because she had received three warnings within a twelve-month period (App. A, *infra*, 1a-2a; App. C, *infra*, 12a-13a).

2. The Board, summarily adopting the findings of fact and conclusions of law of the Administrative Law Judge, concluded that the discharge of Connie Beavers by Florida Tile violated Section 8(a)(3) of the National Labor Relations Act (NLRA), 29 U.S.C. § 158(a)(3), which makes it an unfair labor practice for an employer "by discrimination in regard to . . . tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization" (App. B, *infra*, 3a-4a; App. C, *infra*, 16a). Without considering the burden of proof which the NLRB General Counsel

and an employer must bear in a proceeding under Section 8(a)(3), the Board simply concluded that Florida Tile's asserted reasons for discharging Connie Beavers were pretextual and ordered that Florida Tile reinstate Beavers with backpay (App. C, *infra*, 16a-18a).[8]

In support of its "pretext" conclusion, the Board first determined that Florida Tile "exaggerated the effect of the March 19 morning conversation on Humphrey and Newton," "seized upon [Beavers'] alleged profanity," and "singled out and treated [Beavers] discriminatorily, *vis-a-vis* Newton and Humphrey" (App. C, *infra*, 15a). The Board disregarded Florida Tile's characterization of Beavers' conduct as harrassment and badgering, stating that the facts did not support such a characterization *(ibid.)*.[9]

As for the statements made by Beavers about Humphrey and Newton on the evening of March 19, the Board found, *inter alia*, that the statements "appeared to be of the type that everyone at some time or another is subjected to because of sometimes unavoidable social and business contacts" (App. C, *infra*, 15a). Noting that the two incidents in question occurred on the evening and morning of March 19, the Board concluded that "[o]ne warning would have been more appropriate," and that Florida Tile "seized upon this second and otherwise personal matter to come up with the needed 'two more warn-

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[8] Because the Board summarily adopted the findings and conclusions of the Administrative Law Judge, we refer hereafter to the Judge's findings and conclusions as those of the Board.

[9] The Board pointed out that, sometime after Beavers' discharge, Pat Humphrey had a fight with another employee in the company parking lot during which Humphrey used profanity and as a result of which Florida Tile issued warnings to both Humphrey and the other employee (App. C, *infra*, 14a).

ings' to make a total of three to justify, under its own rules, the automatic discharge of Beavers" (App. C, *infra*, 16a).[10]

3. The court of appeals enforced the Board's order, concluding simply that the Board's decision was supported by substantial evidence (App. A, *infra*, 1a). The court reasoned only that Newton and Humphrey, "who opposed the Union and had used profanity in making derogatory statements, were not disciplined by the Company" (App. A, *infra*, 2a).

In reaching its "substantial evidence" conclusion, the court of appeals did not discuss the burden of proof allocation in a Section 8(a)(3) proceeding.[11]

REASONS FOR GRANTING THE WRIT

This petition presents a significant practical question concerning the proper allocation of burdens and order of proof in Section 8(a)(3) cases where the NLRB General Counsel "contends that an employer's otherwise legitimate act masks an impermissible purpose," and is therefore "pretextual." *Metropolitan Edison Co.* v. *NLRB*, 51 U.S.L.W. 4350, 4352 n.7 (U.S. April 4, 1983). This burden of proof question concerning "pretext" in turn is subsumed in the burden of proof question on "mixed" or

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[10] In the Board's view, "[t]he fact that [Florida Tile] discussed whether to issue one or two warnings reveals" that Florida Tile considered the second incident "but a continuation" of the first (App. C, *infra*, 16a).

[11] The "burden of proof" question was specifically addressed below in the Brief for the National Labor Relations Board, at 12-13, n.5, and in Florida Tile's Reply Brief, at 12-14. In any event, as discussed, *infra*, the issue raised in this petition is an "important, recurring issue" which warrants review by this Court. *See, e.g., Carlson* v. *Green*, 446 U.S. 14, 17 (1980).

"dual" motive cases currently before the Court in *NLRB v. Transportation Management Corp.*, 674 F.2d 130 (1st Cir.) (per curiam), *cert. granted*, 103 S.Ct. 372 (No. 82-168, Nov. 15, 1982).[12]

Although the Solicitor General has argued in *Transportation Management* that there has never been any controversy concerning the proper burden of proof in Section 8(a)(3) "pretext" cases—as opposed to the acknowledged controversy and conflict in "dual motive" cases—an examination of recent cases decided by NLRB Administrative Law Judges, the Board itself, and the courts of appeal demonstrates otherwise. The meaning and application of the Board's burden of proof analysis first enunciated in *Wright Line, a Division of Wright Line, Inc.*, 251 N.L.R.B. 1083 (1980), *enforced on an alternate ground*, 662 F.2d 899 (1st Cir. 1981), *cert. denied*, 455 U.S. 989 (1982), has engendered confusion and chaos in all Section 8(a)(3) cases that must be decided by an examination of an employer's motive.

In contrast to the Solicitor General's explanation of the *Wright Line* burden of proof allocation, the Board and the Sixth Circuit did not properly place the burden of persuasion on the NLRB General Counsel to prove the existence

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[12] As stated in the Solicitor General's petition for a writ of certiorari in *Transportation Management*, the question presented in that case is "[w]hether the National Labor Relations Board properly concluded that an employer violates Section 8(a)(3) . . . if its hostility to an employee's protected union activities is shown, by a preponderance of the evidence, to be a motivating factor in its decision to discharge the employee, and the employer cannot establish by a preponderance of the evidence that it would have discharged the employee for legitimate reasons, absent his union activity." The customary distinction drawn between "dual motive" and "pretext" cases is discussed on p. 13 of the petition, *infra*.

of pretext, but rather improperly imposed a burden of persuasion on Florida Tile to demonstrate the absence of pretext.[13] The court of appeals decision is inconsistent with analogous decisions of this Court interpreting Title VII of the Civil Rights Act of 1964 and conflicts with decisions of other courts of appeal interpreting Section 8(a)(3) of the NLRA.

The Solicitor General has routinely opposed the review by this Court of "pretext" cases on the ground that they present factual "substantial evidence" questions which do not merit the Court's attention and are not affected by the *Wright Line* test.[14] This simple analysis, however, ignores the practical, psychological function of the operation of burdens of proof in a Section 8(a)(3) proceeding. The inferences that are drawn from circumstantial evidence by an Administrative Law Judge and reviewed by the Board and the courts of appeal are directly dependent—particularly in "pretext" cases—on the evidentiary burdens of production and persuasion. We urge the Court to take a fresh look at the burden of proof question in the "pretext" context in light of the brief amplification below of the arguments presented to the

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[13] As used in this petition, the term "burden of production" means the burden "of producing evidence, satisfactory to the judge, of a fact in issue." C. McCormick, *Handbook on the Law of Evidence* § 336 at 783-84 (1972) (footnotes omitted). The term "burden of persuasion" means "the burden of persuading the trier of fact that the alleged fact is true." *Ibid.*; *see* 9 J. Wigmore, *Evidence in Trial at Common Law* §§ 2485-89 (Chadbourne rev. ed. 1981); F. James & G. Hazard, *Civil Procedure* § 7.5 (2d ed. 1977).

[14] *See, e.g.*, Brief for the National Labor Relations Board in Opposition at 4-7, *Pettibone Corp.* v. *NLRB*, 103 S.Ct. 61 (1982) (No. 81-2116) (denying petition); Brief for the National Labor Relations Board in Opposition, at 6-8, *Brewton Fashions, Inc.* v. *NLRB*, 51 U.S.L.W. 3717 (U.S. April 4, 1983) (No. 82-1209) (denying petition).

Court in *Transportation Management* and an examination of how inadequate burden of proof analysis led to erroneous decisions by the NLRB and the court of appeals in this particular case.

1. Several years ago, the United States Court of Appeals for the First Circuit issued the following admonition to the Board concerning its analysis of employers' discriminatory motive and the relationship between discriminatory motive and a finding of "discrimination" in Section 8(a)(3) cases:

> Historically, the Board is prone to two errors: labelling the good reason [justifying an employer's action] "pretextual" without giving it adequate consideration, or contenting itself with finding that the bad reason played a "substantial part." This approach permitted one Board counsel to introduce his argument with the statement that this "is not a dual motive case," thereby assuming the point. The employer always asserts a good motive and the Board a bad one, and the division is not so simplistic.

NLRB v. *Eastern Smelting and Refining Corp.*, 598 F.2d 666, 669-70 (1st Cir. 1979).

Responding to criticism from the courts and commentators like that of the First Circuit, the Board fashioned a new test for examining employer motivation and causality in cases alleging unlawful discrimination under Section 8(a)(3). Following and adopting this Court's test of causality in the First Amendment setting set forth in *Mt. Healthy City School District Board of Education* v. *Doyle*, 429 U.S. 274 (1977), the Board announced the following causation test:

> [W]e shall require that the General Counsel make a *prima facie* showing sufficient to support the inference that protected conduct was a motivating factor in the employer's decision. Once this is estab-

> lished, the burden will shift to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct.

Wright Line, 251 N.L.R.B. at 1089.

The Board announced "that our explication of this test of causation will serve to alleviate the intolerable confusion in the 8(a)(3) area." *Ibid.* As the myriad briefs and arguments currently before the Court in *Transportation Management* demonstrate beyond any doubt, the Board's confidence in the clarity of its analysis was premature.[15]

The "intolerable confusion" has extended not just to cases where the Board finds that an employer had both a "good motive" and a "bad motive" for a personnel action—the pure "dual motive" situation—but also where—as in this case—the Board finds that an employer's good motive "is a sham in that the purported rule or circumstance advanced by the employer did not exist, or was not, in fact relied upon." 251 N.L.R.B. at 1984. As the Board notes, "[w]hen this occurs, the reason advanced by the employer may be termed pretextual." *Ibid.*

In *Wright Line*, the Board explicitly stated that "under the *Mt. Healthy* test, there is no real need to distinguish between pretext and dual motive cases." 251 N.L.R.B. at 1083 n.4. Conceding that "the distinction between a pretext case and a dual motive case is sometimes difficult to

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[15] *See, e.g.*, Brief for the National Labor Relations Board, 27-29, 32, nn.17-18, 21, *NLRB* v. *Transportation Management Corp.* (No. 82-168) (noting conflict in the courts of appeal arising out of application of *Wright Line* test). *See also Royal Development Co.* v. *NLRB*, 112 L.R.R.M. (BNA) 2932, 2934-37 (9th Cir. Feb. 22, 1983) (discussing and acknowledging conflict in Ninth Circuit's own precedent after *Wright Line*).

discern," the Board then made the following fatal error in its analysis:

> The conceptual problems to which this sometimes blurred distinction gives rise can be eliminated if one views the employer's asserted justification *as an affirmative defense*. Thus, in a pretext situation, the employer's affirmative defense of business justification is wholly without merit. . . . Treating the employer's plea of a legitimate business reason for discipline as an affirmative defense is consistent with the Board's method of deciding such cases.

251 N.L.R.B. at 1084 n.5 (emphasis added).[16]

The Board's analysis of pretext in *Wright Line* allowed some courts and commentators to conclude "that the *Mt. Healthy/Wright Line* test actually shifts onto the employer the burden of proving . . . that its asserted lawful reasons for its actions are not pretextual . . . ." Remar, *Climbing Mt. Healthy: In Search of the "Wright Line" on Mixed-Motive Discharges Under Section 8(a)(3)*, 4 Indus. Rel. L.J. 636, 674 (1981); *see, e.g., Republic Die and Tool Co.* v. *NLRB*, 680 F.2d 463, 465 (6th Cir. 1982); *NLRB* v. *Senftner Volkswagen Corp.*, 681 F.2d 557, 560 (8th Cir. 1982) (per curiam); *NLRB* v. *Charles Batchelder Co.*, 646 F.2d 33, 43 (2d Cir. 1981) (Newman J., concurring). Other courts of appeal have strongly disagreed and stressed that the burden of persuasion—including the burden to show pretext—remains on the General Counsel

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[16] The Board compounded the confusion by stating that "this shifting of burdens does not undermine the established concept that the General Counsel must establish an unfair labor practice by a preponderance of the evidence. The shifted burden merely requires the employer to make out what is actually an affirmative defense . . . to overcome the *prima facie* case of wrongful motive. Such a requirement does not shift the ultimate burden." 251 N.L.R.B. at 1088 n.11.

at all times. *See, e.g., NLRB* v. *Webb Ford, Inc.*, 689 F.2d 733, 739 (7th Cir. 1982) (denying enforcement of Board order where "the ALJ appears to have imposed upon the employer the burden of demonstrating that the decision to discharge would have been the same in the absence of protected conduct" and stressing that the burden of demonstrating pretext "remains with the Board"); *Behring International, Inc.* v. *NLRB*, 675 F.2d 83, 89 (3d Cir. 1982) ("Board has mischaracterized the employer's burden of producing rebuttal evidence as an affirmative defense, which it in no way resembles"), *NLRB* v. *Wright Line*, 662 F.2d 899, 906 n.12 (1st Cir. 1981) (General Counsel "must prove, by a preponderance of the evidence, that the employer had an illegal motivation and that the employer would not have fired the employee anyway for a valid business reason"), *cert. denied*, 455 U.S. 989 (1982); *cf. United States Postal Service Board of Governors* v. *Aikens*, 51 U.S.L.W. 4354, 4356 (U.S. April 4, 1983) (Blackmun J., concurring) (under Title VII of the Civil Rights Act of 1964, plaintiff must "demonstrate that the legitimate nondiscriminatory reason given by the employer is in fact not the true reason for the employment decision"); *Texas Department of Community Affairs* v. *Burdine*, 450 U.S. 248, 254 (1981) (under Title VII, "defendant need not persuade the court that it was actually motivated by the proffered [legitimate, nondiscriminatory] reasons").[17]

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[17] *See also NLRB* v. *N.Y. University Medical Center*, 112 L.R.R.M. (BNA) 2633, 2641 n.9 (2d Cir. Jan. 21, 1983) (rejecting *Wright Line* imposition of affirmative defense on employer and noting that "it is quite unpersuasive to claim that the burden is shifted on only . . . one issue and that the ultimate burden rests with the Board"); n.16 *supra*.

The Sixth Circuit's ambiguous, inconsistent, and often erroneous application of *Wright Line* is best viewed in a comparison of its burden of proof analyses in *Republic Die and Tool Co.* v. *NLRB*, 680 F.2d 463 (6th Cir. 1982) and *W.B. Coal Co.* v. *Federal Mine Safety and Health Review Commission*, 1983 O.S.H.D. (CCH) ¶ 26,495 (6th Cir. April 5, 1983) (not yet officially reported), *petition for rehearing pending.* In *Republic Die and Tool*, the court dismissed the company's contention that the Board erred in its application of the test and rationale of *Wright Line*, stating with approval that "[t]he ALJ found that the Company failed to prove any legitimate reason for . . . discharge because the reasons advanced by the Company were all held to be 'purely pretextual' to mask unlawful motivation." 680 F.2d at 465. The court added that the sole question before it was "whether substantial evidence supports the finding that the Company *proved* no legitimate reasons for discharging" the employee in question. *Ibid.* (Emphasis added). The court acknowledged that the "ALJ did not discuss the Company's argument" in evaluating and upholding the General Counsel's *prima facie* case. *Id.* at 464. Therefore, it is clear that the court was requiring the employer to prove, by a preponderance of the evidence, that its reasons for discharge were legitimate and non-pretextual.

In contrast to *Republic Die and Tool*, the Sixth Circuit in *W.B. Coal*—a discriminatory discharge case under Section 105 of the Federal Mine Safety and Health Act of 1977 (MSHA), 30 U.S.C. § 815—expressly rejected *Wright Line* burden-shifting. Concluding that the burden of proof tests under Section 105 of MSHA and Section 8(a)(3) of the NLRA were essentially the same, the court concluded that "the employer has the burden only of producing evidence of a legitimate business purpose sufficient to create a genuine issue of fact." 1983 O.S.H.D.

(CCH) ¶ 26,495, at 33,696. The court added that once the employer introduces such evidence, the plaintiff may rebut the employer's evidence "directly by persuading the trier of fact that a discriminatory reason more likely motivated the employer, or indirectly by showing that the employer's proffered explanation is unworthy of credence." *Ibid.* (quoting *Texas Department of Community Affairs* v. *Burdine*, 450 U.S. at 256 (1981)).

In examining the legitimate, nondiscriminatory reasons proffered by Florida Tile in this case, the Sixth Circuit ducked the burden of proof issue altogether. The court's decision not to analyze the issue, however, cannot obscure the fact that—at least prior to its decision last month in *W.B. Coal*—the court had approved the burden-shifting test promulgated in *Wright Line*.[18] As the court's discussion of "pretext" in *Republic Die and Tool* indicates, the court has interpreted the *Wright Line* burden-shifting test to require a shift in the burden of persuasion to the employer to prove the absence of pretext. That the Sixth Circuit has shifted gears only accentuates the error of its initial approach to the question.

Such conflict—both within the Sixth Circuit in particular and among the courts of appeal in general—can only compound the Board's own misapprehensions about the proper application of its *Wright Line* test and an employ-

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[18] *See Borel Restaurant Corp.* v. *NLRB*, 676 F.2d 190, 192-93 (6th Cir. 1982) (citing *Wright Line* test with approval); *NLRB* v. *Lloyd A. Fry Roofing Co.*, 651 F.2d 442, 446 (6th Cir. 1981) (same). *See also NLRB* v. *Comgeneral Corp.*, 684 F.2d 367, 370 (6th Cir. 1982) (per curiam) (enforcing Board order on basis of either *Wright Line* or "dominant motive" test); *Charge Card Association* v. *NLRB*, 653 F.2d 272, 275 (6th Cir. 1982) (order) (same); *NLRB* v. *Consolidated Freightways Corp.*, 651 F.2d 436, 437-38 (6th Cir. 1981) (order) (same).

er's burden of proof under Section 8(a)(3). This Court should grant review in this case to make clear that the confusion surrounding the burden of proof question has not been limited solely to pure "dual motive" cases but extends to all Section 8(a)(3) cases implicating employer motivation, including "pretext" cases.

2. In the Reply Brief submitted to the Court by the Board in *Transportation Management*, the Solicitor General discounts the rampant confusion regarding the consideration of evidence relating to "pretext" by the Board and the courts. In discussing how an NLRB Administrative Law Judge (ALJ) considers evidence submitted in a Section 8(a)(3) case, the Solicitor General states as follows:

> First, the ALJ determines whether the General Counsel has established by a preponderance of the evidence that the employer acted for an unlawful reason. At this stage, the ALJ considers both the General Counsel's evidence of unlawful motive and all of the employer's evidence that would tend to rebut the existence of an unlawful motive, including evidence of any lawful motive.

Reply Brief at 4. The Solicitor General concedes that the General Counsel has the burden of proving, by a preponderance of the evidence, that an "employer's asserted lawful motive is a pretext." *Ibid.* It is only when the General Counsel cannot disprove the existence of a lawful motive, the Solicitor General argues, that the burden of persuasion shifts to the employer in order to give "the employer the opportunity to avoid a finding of a violation by establishing as an affirmative defense that it would have dismissed the employee for the legitimate reason, even in the absence of the employee's protected activity." *Id.* at 5.

The Solicitor General's post-hoc evaluation of NLRB decisionmaking simply does not reflect the reality of how NLRB Administrative Law Judges have evaluated evidence in Section 8(a)(3) cases since the Board's pronouncements in *Wright Line*. The key error in the Solicitor General's analysis rests in his assertion that Administrative Law Judges consider "both the General Counsel's evidence of lawful motive and all the employer's evidence that would tend to rebut the existence of unlawful motive" at the *prima facie* stage of the burden of proof allocation.

The *Wright Line* test, itself, however, does not explicitly mandate that an employer's evidence be considered by the Administrative Law Judges at the *prima facie* stage. Indeed, the language of the test suggests otherwise. On the one hand, it focuses on the General Counsel's burden of proof in the *prima facie* setting and, on the other hand, focuses on the employer's burden of proof in meeting the *prima facie* case if established. In essence, the Solicitor General in *Transportation Management* has reformulated the two-part *Wright Line* test as a four-part test, thereby removing the blatant ambiguities in *Wright Line* and ensuring that the employer does not have the burden of proving the absence of pretext.[19]

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[19] The Solicitor General's four-part test conforms the term "*prima facie* case" to its most commonly understood use. As one commentator has noted, "the *prima facie* case doctrine helps to answer the following question: *In the absence of conflicting evidence*, how much evidence on the elements of his case should a plaintiff be required to submit in order to sustain a judgment in his favor." Belton, *Burdens of Pleading and Proof in Discrimination Cases: Toward A Theory of Procedural Justice*, 34 Vand. L. Rev. 1205, 1213-14 (1981) (emphasis added); *see Furnco Construction Corp.* v. *Waters*, 438 U.S. 567, 576

Stated another way, the Board and its Administrative Law Judges have tended to equate a showing by the General Counsel of anti-union animus on the part of the employer with the *prima facie* showing in *Wright Line* that such animus was a "motivating factor" in an employer's personnel decision. The evidence adduced by an employer of a legitimate, non-discriminatory reason for a disciplinary decision is just as likely, if not more likely, to be treated as part of an affirmative defense than it is to be treated as weighing in the *prima facie* calculus.[20]

The net result of this imprecision in the Board's burden of proof analysis is that the Board, as a practical matter,

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(1978) (explaining *prima facie* case under Title VII as "showing actions taken by the employer from which one can infer, if *such actions remain unexplained*, that it is more likely than not that such actions were based on a discriminatory criterion illegal under the Act") (emphasis added).

[20] In his opening brief in *Transportation Management*, the Solicitor General cited twelve cases in support of the proposition that "[t]he Board's *Wright Line* test has provided employers with a meaningful opportunity to establish a defense." Brief for the National Labor Relations Board, at 37-38 n.25; *see Fieldcrest Mills, Inc.*, 264 N.L.R.B. No. 86 (Sept. 30, 1982); *Pacific Intermountain Express Co.*, 264 N.L.R.B. No. 47 (Sept. 30, 1982); *WNAC-TV Division, RKO General, Inc.*, 264 N.L.R.B. No. 31 (Sept. 28, 1982); *Host Services, Inc.*, 263 N.L.R.B. No. 86 (Aug. 24, 1982); *Eaton Corp.*, 262 N.L.R.B. No. 18 (June 9, 1982); *Coil-Acc, Inc.*, 262 N.L.R.B. No. 12 (June 9, 1982); *Allied Eastern States Maintenance Corp.*, 261 N.L.R.B. No. 167 (May 28, 1982); *Lafayette Steel Erector, Inc.*, 260 N.L.R.B. No. 160 (Mar. 26, 1982); *Eau Claire Press Co.*, 260 N.L.R.B. No. 148 (Mar. 19, 1982); *St. Joseph Hospital Corp.*, 260 N.L.R.B. No. 89 (Mar. 8, 1982); *Parker Hannifin Corp.*, 259 N.L.R.B. 263 (1981); *Litton Mellonics Systems Division, Division of Litton Systems, Inc.*, 258 N.L.R.B. 623 (1981). Examination of these twelve cases demonstrates that, in almost half the cases the employer's evidence was only considered in the *Wright Line* evaluation in

has by no means uniformly required the General Counsel to prove that a legitimate non-discriminatory reason advanced by an employer in Section 8(a)(3) cases is pretextual. For example, in *Golden Beverage of San Antonio,*

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connection with the employer's affirmative defense—step two in the *Wright Line* analysis, step four in the Solicitor General's *Transportation Management* analysis.

In two of the twelve cases, the employer conceded that anti-union animus was a "motivating factor"—*St. Joseph Hospital Corp.* and *Allied Eastern States Maintenance Corp.* In only five of the other ten remaining decisions did the Board or the Administrative Law Judge factor the employer's evidence tending to rebut the existence of an unlawful motive into the analysis of the General Counsel's *prima facie* case—*WNAC-TV, Allied Eastern States Maintenance Corp., Eau Claire Press Co.*, and *Litton Mellonics Systems Division.* In the other five cases, the Board or the ALJ simply examined the General Counsel's evidence of employer animus as part of the *prima facie* case and then examined the employer's evidence of legitimate non-discriminatory reasons rebutting animus as part of the employer's affirmative defense. *See, e.g., Host Services, Inc.*, 263 N.L.R.B. No. 86, slip op. at 2-3 & n.3; *Lafayette Steel Erector, Inc.*, 260 N.L.R.B. No. 160, ALJD at 4-5 (*prima facie* case of motivation based solely on timing of discharge; employer evidence that discharge occurred through "regular business related process" analyzed as part of affirmative defense); *Parker Hannifin Corp.*, 259 N.L.R.B. at 266-67 (*prima facie* case based on employee's position as leading union adherent and employer's interrogations of employee; employer evidence of employee's inability to spend sufficient time in work place and absence of disparate treatment analyzed as part of affirmative defense). *See also Daniel Construction Co., a Division of Daniel International Corp.*, 264 N.L.R.B. No. 79, slip op. at 2 n.1. (Sept. 30, 1982) (expressly disavowing ALJ's discussion of Supreme Court Title VII precedent in conjunction with ALJ's analysis of *prima facie* case under *Wright Line*). Consequently, even in the arguably pure "dual motive" setting to which the Solicitor General's discussion in *Transportation Management* is specifically directed, this sample of Board decisional law hardly reveals assiduous adherence to the Solicitor General's analysis of how the Board has applied *Wright Line* in practice.

Inc., 256 N.L.R.B. 469 (1981), the Board concluded that "Respondent has failed to adduce a cogent explanation indicating a nondiscriminatory motive for the discharges" and therefore "has not met its burden to establish affirmatively the lawfulness of those discharges." *Id.* at 472. Had the Board in *Golden Beverage* interpreted *Wright Line* in the manner explained by the Solicitor General in *Transportation Management*, the Board would not have considered whether the employer adduced a "cogent explanation" as part of an affirmative defense. An employer need only adduce an "explanation"; the General Counsel must prove that the explanation is not "cogent" as part of his *prima facie* showing of pretext.

In short, the mere incantation of the term "pretext" by Administrative Law Judges, the Board, and the courts of appeal has not ensured that they have required the General Counsel to *prove* pretext, as the Solicitor General concedes the General Counsel must. Such casual and imprecise analysis cannot help but affect not only the decisions of the Administrative Law Judges who make initial findings of fact but also decisions of the Board and the courts of appeal that review those findings. As one noted commentator has cogently observed:

> [E]ven where the employer produces evidence of substantial justification for his conduct, the shifting of the burden of proof on the issue of justification to the employer may place the Board in a position where it can weigh the employer's evidence of justification against that produced by the General Counsel and find against the employer, even though the employer may have introduced very strong evidence of legitimate business justification. Consequently, it may well be most difficult for employers to reverse such a finding by the Board in the Court of Appeals in light of the rule in *Universal Camera Corp.* v. *NLRB* that the courts will not reverse the

> Board where its findings and conclusions are supported by substantial evidence on the record considered as a whole.

Janofsky, *New Concepts in Interference and Discrimination Under the NLRA: The Legacy of American Ship Building and Great Dane Trailers*, 70 Colum. L. Rev. 81, 98 (1979); *see Lavine* v. *Milne*, 424 U.S. 577, 585 (1976) (allocation of burden of proof during trial often has a significant effect on the outcome of a case and frequently may be dispositive). When the court of appeals also misapprehends the appropriate burden of proof standard—as in the present case—the difficulty of obtaining reversal of improperly drawn findings is obviously exacerbated and should be reviewed by this Court. A "standard of proof is more than an empty semantic exercise." *Tippett* v. *Maryland*, 436 F.2d 1153, 1166 (4th Cir. 1971) (Sobeloff, J., concurring in part and dissenting in part), *cert. dismissed sub nom. Murel* v. *Baltimore City Criminal Court*, 407 U.S. 355 (1972) (per curiam).

3. This case presents a classic illustration of the difference between the burdens of production and persuasion and how the imposition of an improper burden of persuasion affects the perceptions, findings, and conclusions of the trier of fact. There can be no dispute in this case that Florida Tile produced evidence of legitimate, nondiscriminatory reasons for the discharge of Connie Beavers. There is no question that Florida Tile maintains a company rule mandating that an employee who receives three warnings in one calendar year be discharged. Florida Tile explained in great detail its disciplinary decision-making process and reliance on company policy that resulted in the issuance of the warnings leading to Beavers' discharge. Florida Tile also introduced extensive evidence of the events and circumstances surrounding its decision to issue the warnings in question to Beavers.

At this point, the burden of persuasion rested squarely on the General Counsel to prove by a preponderance of the evidence that the reasons proferred by Florida Tile did not in fact exist or were not relied upon. By using the word "pretext," though, the Administrative Law Judge, the Board, and the Sixth Circuit in essence required Florida Tile to bear the burden of persuasion and prove, by a preponderance of the evidence, that it was actually motivated by the reasons advanced.

The Board's improper burden-shifting can be seen most clearly in its discussion of the events of the night of March 19 which culminated in the issuance of the second warning to Beavers. The Board conceded that Beavers' discussion of her fellow employee's private sexual behavior was "neither proper nor acceptable" (App. C, *infra*, 15a). The Board also acknowledged that "[s]uch talk is especially vicious and malicious when it is false" *(ibid.)*. That Beavers said she "wouldn't touch Pat Humphrey with a 10-foot pole because she was scared she might have VD" without any knowledge that Humphrey had VD is simply not in dispute (App. C, *infra*, 10a; JA-151). That Beavers initiated her conversations about Humphrey that evening only to be hateful and spiteful is also not in dispute *(ibid.)*.[21] Yet, the Board found that the facts did not support the company's warning to Beavers " 'for making vicious and malicious statements' about a fellow employee" (App. C, *infra*, 15a). This obvious inconsistency in the Board's opinion is directly attributable to the Board's inattention to the proper allocation of the burden of proof. Florida Tile was not required to persuade the Board that

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[21] Indeed, Beavers' "VD" accusation could clearly have been construed as defamatory and at common law is slanderous *per se*. *See generally* Restatement (Second) of Torts § 569 comment f (1977); R. Sack, *Libel, Slander and Related Problems* 75 (1980).

Beavers' statements were vicious and malicious, but only to produce evidence that she made such statements. As the Board found, Florida Tile produced extensive evidence on that very point.

Still further, the Board found that "[t]he fact that Florida Tile discussed whether to issue one or two warnings among its supervisors reveals" that Florida Tile considered the two incidents leading to Beavers' discharge to be one continuous incident. To the contrary, the Board's finding confirming the existence of the discussion should in and of itself have been sufficient to satisfy its burden of producing evidence that it did in fact consider the events and circumstances occurring during the two shifts of March 19 to be two incidents justifying two warnings. The Board, though, stated that "[o]ne warning would have been more appropriate. . ." (App. C, *infra*, 16a). The Board effectively placed on Florida Tile the burden to persuade it that the company's warnings were appropriate instead of imposing on the General Counsel the burden to persuade it that the warnings were inappropriate. One can only wonder what conclusions the Board would have drawn if Florida Tile supervisors had not discussed how many warnings to issue!

Finally, with respect to the events resulting in the first warning issued to Beavers, both the Board and the Sixth Circuit stressed that Beavers, a pro-union employee, was disciplined, while her anti-union co-workers were not (App. A, *infra*, 2a; App. C, *infra*, 14a). However, not only did Florida Tile introduce evidence of legitimate reasons for this disparate treatment,[22] but it also in-

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[22] Florida Tile introduced testimony from all the witnesses present in the locker room on the morning of March 19. They uniformly agreed that they had never heard an employee use such vicious

troduced evidence that, prior to Beavers' discharge, it had discharged a pro-company employee while retaining a pro-union employee (JA-290). Under similar circumstances, the Seventh Circuit—applying a proper burden of proof analysis—concluded that "[t]he fact that not all of the employees engaging in the same type of concerted activity were discharged attenuates any inference that the discharge was retaliatory." *NLRB* v. *Webb Ford, Inc.*, 689 F.2d 733, 738 (7th Cir. 1982).

The diametrically opposed conclusions of the Sixth Circuit in this case and the Seventh Circuit in *Webb Ford* highlight the inescapable conclusion that had the Board and the Sixth Circuit focused on and applied a proper burden of proof allocation, they would have concluded that Florida Tile did not violate Section 8(a)(3).

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profanity in the flagrantly hostile and intimidating fashion that Beavers employed on that morning (*see* p. 5 *supra*). Florida Tile produced evidence making clear that it was not disciplining Beavers for the mere use of profanity, but for the way in which it was used. Yet, the Board and the Sixth Circuit ignored Florida Tile's legitimate nondiscriminatory reasons, concluding that the company's characterization of Beavers' conduct was not supported by the facts and criticizing the company for not disciplining Beavers' co-workers, Humphrey and Newton (App. A, *infra*, 2a; App. C, *infra*, 14a). Thus, in one breath, the Board stated that "the fact that Connie Beavers used profanity . . . is not in dispute" (App. C, *infra*, 13a). In the other breath, the Board stated that Florida Tile seized upon Beavers' "*alleged* profanity" (App. C, *infra*, 15a) (emphasis added). The Sixth Circuit deemed it significant that other employees "who opposed the Union and had used profanity in making derogatory statements were not disciplined by the Company" (App. A, *infra*, 2a), and named Humphrey as one of those employees who should have been disciplined. Yet, there was never any Board finding that Humphrey had used profanity in the incident. The conclusions of the Board and the Sixth Circuit bear no relationship to the findings—a direct result of their inadequate, faulty burden of proof analysis and allocation.

4. This Court's upcoming decision in *Transportation Management* should bring order out of the burden of proof chaos which this case exemplifies. It is well-settled that if an "intervening decision [of this Court] has shed new light on the law which, if it had been available at the time of the court of appeals' decision, might have led to a different result," it is proper for this Court to grant certiorari and vacate the court of appeals judgment "in order to allow that court to reconsider its decision." *Board of Trustees of Keene State College* v. *Sweeney*, 439 U.S. 24, 25-26 (1978) (Stevens, J., dissenting). For the reasons stated in this petition, we respectfully submit that granting the writ and vacating the judgment below is both appropriate and necessary in light of the intolerable conflict and confusion in both "pretext" cases in general and this case in particular. *See, e.g., Nashville Gas Co.* v. *Satty*, 434 U.S. 136, 145-46 (1978), *Central Hardware Co.* v. *NLRB*, 407 U.S. 539, 548 (1972); *NLRB* v. *Walton Manufacturing Co.*, 369 U.S. 404, 408-09 (1962). *See also Alewine* v. *City Council of Augusta*, 699 F.2d 1060, 1068 (11th Cir. 1983) (noting significance of Court's determination to vacate judgment and remand for reconsideration in Tenth Amendment case under Fair Labor Standards Act).[23]

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[23] It may be appropriate in turn for the Sixth Circuit to remand this case to the Board to reconsider its decision in light of *Transportation Management*. *See, e.g., FTC* v. *Sperry and Hutchinson Co.*, 405 U.S. 233, 249-50 (1972); *SEC* v. *Chenery Corp.*, 318 U.S. 80, 89, 94-95 (1943).

CONCLUSION

For the foregoing reasons, Petitioner, Florida Tile Company, respectfully prays that a Writ of Certiorari be granted.

Respectfully submitted,

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MAY 1983

APPENDIX A

Nos. 81-1402 & 81-1467

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD,
Petitioner/Cross-Respondent,

v.

FLORIDA TILE COMPANY,
DIVISION OF SIKES CORPORATION,
Respondent/Cross-Petitioner.

FILED
NOV 2, 1982
JOHN P. HEHMAN, Clerk

ORDER

Before ENGEL and KEITH, Circuit Judges, and PHILLIPS, Senior Circuit Judge.

This case is before the court upon application of the National Labor Relations Board for enforcement (No. 81-1402) and Florida Tile Company's petition for review (No. 81-1467) of the decision and order of the Board reported at 255 N.L.R.B. No. 9. Reference is made to the decision of the Board for a recitation of pertinent facts and issues.

Upon consideration, the court concludes that the decision of the Board is supported by substantial evidence on the record considered as a whole. *Universal Camera Corp.* v. *N.L.R.B.*, 340 U.S. 474 (1951). This includes that part of the decision and order holding that the company violated §§ 8(a)(3) and (1) of the Act by discharging Ms. Connie Beavers, and directing her reinstatement with backpay.

Ms. Beavers was discharged after she solicited the signing of Union authorization cards, had worn a Union button and otherwise supported the campaign of the Union to represent the employees as collective bargaining representative. A company

rule authorized the discharge of an employee after receipt of three disciplinary slips in one year. Ms. Beavers had received only one disciplinary slip before the beginning of the Union campaign. After she had begun soliciting signature cards, she was presented with two disciplinary slips at the same time growing out of two incidents occuring the same day. Ms. Beavers was discharged for "harassing and badgering another employee to do something against her will" and for "making vicious and malicious statements about a fellow employee," both of which statements included profanity. It is significant that two other employees, Ms. Joan Newton and Ms. Pat Humphrey, who opposed the Union and had used profanity in making derogatory statements, were not disciplined by the Company. *See, e.g., Head Division, AMF, Inc.* v. *N.L.R.B.*, 593 F.2d 972, 975 (10th Cir. 1979) (disparate treatment of employees supports inference of unlawful motivation); *N.L.R.B.* v. *Big Three Industrial Gas & Equipment Co.*, 579 F.2d 304, 312 (5th Cir. 1978), *cert. denied*, 440 U.S. 960 (1979) (disparate enforcement of valid company rule is proper basis for inference of unlawful motivation).

Accordingly, it is ORDERED that the order of the Board be and hereby is enforced.

Entered by order of the court.

/s/ John P. Hehman
CLERK
JOHN P. HEHMAN

Attest:
JOHN P. HEHMAN
By Audrey Crockett
Deputy Clerk

APPENDIX B

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FJZ
D—7501
Lawrenceburg, KY

255 NLRB No. 9

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

Case 9—CA—13773

FLORIDA TILE COMPANY,
DIVISION OF SIKES CORPORATION

and

UNITED STEELWORKERS OF
AMERICA, AFL—CIO—CLC

DECISION AND ORDER

On September 5, 1980, Administrative Law Judge George Norman issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief,[1] and the General Counsel filed a brief in answer to Respondent's exceptions.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge and to adopt his recommended Order, as modified herein.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts

[1] Respondent's request for oral argument is hereby denied inasmuch as the record, exceptions, and briefs adequately present the issues and the positions of the parties.

as its Order the recommended Order of the Administrative Law Judge, as modified below, and hereby orders the Respondent, Florida Tile Company, Division of Sikes Corporation, Lawrenceburg, Kentucky, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, as so modified:

Substitute the following for paragraph 2(d):

"(d) Post at its office and place of business in Lawrenceburg, Kentucky, copies of the attached notice marked 'Appendix.'[12] Copies of said notice, on forms provided by the Regional Director for Region 9, after being duly signed by Respondent's authorized representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material."

Dated, Washington, D.C. March, 27, 1981

John H. Fanning, *Chairman*

Howard Jenkins, Jr., *Member*

Don A. Zimmerman, *Member*

NATIONAL LABOR RELATIONS BOARD

APPENDIX C

JD-515-80
Lawrenceburg, KY

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

Case No. 9-CA-13773

FLORIDA TILE COMPANY, DIVISION
OF SIKES CORPORATION

and

UNITED STEELWORKERS OF AMERICA,
AFL—CIO—CLC

John M. Breckenridge, Jr., of
Tampa, FL, for the Employer.
Andrew L. Lang, Esq., NLRB, of
Cincinnati, OH, for the General Counsel.

DECISION

Statement of the Case

GEORGE NORMAN, Administrative Law Judge: The trial in this case was held in Lawrenceburg, Kentucky on January 10 and 30, and February 13, 1980. The complaint which was issued on June 12, 1979, by the Regional Director of Region 9 of the National Labor Relations Board (herein the Board) is based on a charge filed by the United Steelworkers of America, AFL-CIO-CLC (herein the Union) on April 23, 1979, alleging that Respondent violated Sections 8(a)(1) and (3) of the National Labor Relations Act (herein the Act) by issuing two written reprimands to employee Connie Beavers and thereafter discharging her.

Respondent denied the substantive allegations of the complaint.

All parties were given full opportunity to participate, introduce relevant evidence, to examine and cross-examine witnesses, and to argue orally. The General Counsel and the Respondent filed briefs.

Upon the entire record including my consideration of the briefs and careful observation of the witnesses and their demeanor, I make the following:

Findings of Fact

I. The Business Of Respondent

Respondent Florida Tile Company, Division of Sikes Corporation is engaged in the manufacture and distribution of tile at its Lawrenceburg, Kentucky facility. During the past 12 months, a representative period, Respondent sold and shipped goods and materials, valued in excess of $50,000, from its Lawrenceburg, Kentucky facility directly to points outside the State of Kentucky. Respondent is an employer within the meaning of Section 2(2) of the Act, engaged in commerce and an operation affecting commerce within the meaning of Section 2(6) and (7) of the Act.

II. The Labor Organization

United Steelworkers of America, AFL-CIO-CLC is a labor organization within the meaning of Section 2(5) of the Act.

III. The Alleged Unfair Labor Practices

Connie Beavers started working for Respondent at its Lawrenceburg, Kentucky plant on November 12, 1977, and was terminated on March 23, 1979.[1] She was employed as a sorter of tiles along with certain other employees who were in the same job classification. She started getting involved in the union organizational drive at Respondent's plant in January. She attended her first meeting in January where she received

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[1] All events herein occurred in 1979 unless otherwise indicated.

union buttons and pamphlets. She wore her union button on her shoulder at work and succeeded in getting several fellow employees to sign union authorization cards while at work.

On Monday, March 19, at about 4:30 a.m. (end of the third shift 6 p.m. to 4:30 a.m.) Connie Beavers and a fellow worker Nancy Caudill were in the women's locker room after work attempting to get other employees who also just finished work to sign union authorization cards.[2] As Nancy Caudill assisted Vickie Darnell in filling out a union authorization card, Connie Beavers approached employee Pat Humphrey and asked her to sign an authorization card. Pat Humphrey's version of the event is as follows:

> "Well, I had just finished my shift and I was going into the locker room and Connie Beavers and Nancy Caudill were in the locker room. And when I walked in she asked me if I would like to sign a Union card, and I said, no way. And she said, oh, come on. If you do, everybody else will. And I said, I don't know. And she said, come on Pat. And I said, well, let me see it. So Nancy Caudill handed me a Union card. And I was looking at it and I knelt down by the locker and I had an ink pen and the card in my hand and I started to sign it.
>
> And I was thinking to myself that I didn't want to sign it and I kept telling Connie that I didn't want to sign it. And about that time Joan Newton walked out of the girls' restroom and she said, Pat, what are you doing. I said I don't know for sure what I am doing yet. I said, Connie wants me to sign this Union card.
>
> And she said, Well I am not telling you what to do but if I was you, I wouldn't. And I said, I don't really want to. And then about that time, Connie jumps up and she says, Pat, do you tell Joan who to—who to fuck, who, when, where, and how. And Joan said, Pat don't tell me what to do. And Connie says, Okay, then don't let Joan tell you what to do. And I said, Joan don't tell me what to do. And she said,

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[2] Pat Humphrey testified that she had not heard of anyone except Connie Beavers and Nancy Caudill trying to get people to sign union authorization cards.

> Well she just fucking did. She tried to tell you not to sign this Union card.
>
> And then I said, Connie, I didn't want to sign this card before. And lets see—what else was there? She said something about, don't let Joan run your life. And I said Joan doesn't run my life. And I said, I can run my own life. I said, didn't I tell you my husband didn't want me to sign a Union card, because he was in a Union where he worked. And he said all it was good for was to take your money, and he didn't want me to sign it. And then she asked me if my brother had a union where he was working and did he complain about it. And I said, Well, I don't know, I never heard him say anything about it.
>
> And then she kept asking me to sign a card and I kept telling her no, I didn't think I wanted to.
>
> And we got up and was fixing to leave the locker room, and she kept telling me to go ahead and let Joan run my fucking life. And I said, Joan don't run my life, I'm old enough to run my own. And Joan says, oh, come on. And as we walked out the door she said, those dumb bitches—or damn bitches, something about bitches when we walked out of the locker room."[3]

Nancy Caudill testified that Joan Newton came out of the bathroom "and she shook her head or said something to the effect, you better not, or, I wouldn't do that." Newton addressed her remark to Pat Humphrey. She said that Pat Humphrey replied, "Well, I think maybe I'd better think about it a while." Connie then said, "Don't you have a mind of your own? Does Joan tell you what to do? And Pat said 'Nobody tells me what the hell to do'. And Connie said 'Well, she just fucking well did."

Caudill testified further that words went back and forth between the three and, as Humphrey and Newton were leaving, "Connie was still saying something and Joan and Pat—as Joan and Pat were going out the door, Connie was still saying

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[3] The above is a direct quote from the transcript by the Acme Reporting Company, including punctuation or lack thereof.

something. I don't remember what. And Joannie, as she was going out the door, she says, 'Oh, Connie, shut your fucking mouth,' in that tone of voice. Connie replied, 'If you think you can, come back and make me.' "[4]

Connie Beavers, Joan Newton and Pat Humphrey had good relations prior to that conversation in the locker room. In fact, Newton & Beavers were in a carpool together. Joan Newton and Pat Humphrey were scheduled to pick up Connie Beavers at Long John Silvers on the way to work and the three were to ride together that same day to report to work at 6 p.m. Monday evening. In that connection, Pat Humphrey testified that she and Joan Newton were supposed to give Connie Beavers a ride to work that Monday night, March 19. When asked whether they did pick up Connie Beavers, Humphrey said, "No, when we got to where her car was parked she wasn't sitting in it and we didn't know whether she was waiting for us or whatever, and we just went on and left her anyway."[5] Connie Beavers testified that on the evening of March 19 she went to Long John Silvers to wait to be picked up by Cathy, Joan Newton and Pat Humphrey. She sat there from 4:35 to 4:55 and, when no one showed up, she left and drove to work by herself. Concerning the conversation of the morning of March 19, Pat Humphrey testified that that was the first time she had ever heard anyone cuss somebody like that (referring to Connie Beavers' state-

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[4] Caudill's version was corroborated by Beavers, and Humphrey's version was corroborated by Newton. According to the testimony of those witnesses and others the language of the type used above was not uncommon in the plant among both employees and supervisors. It appears that all three parties to that conversation used four letter words not only then but probably quite frequently in the plant. I believe Caudill's version as to what Joan Newton said to Beavers as she was leaving the plant.

[5] In view of that testimony the conclusion is inescapable that Humphrey and Newton couldn't have been too upset with Beavers' remarks to them on the morning of the same day inasmuch as they were prepared to pick her up.

ments to her). However, on cross-examination Humphrey admitted that she had called fellow employee Linda Hahn a whore in the parking lot of the Company, and that she and Hahn were on the ground of the parking lot "slugging it out." "She called me something too. That's why I called her one." She was asked if that's when she accused Kahn of "shacking up" and Humphrey replied in the affirmative, adding that it was true. She said that, at the time, she told the Company what had happened. Both employees received warning slips for that incident.

Beavers' Remarks To Charlie Smith

Beavers said that on the evening of March 19, Humphrey and Newton were working across the room from her and that it was not possible for anyone speaking in a normal tone to be heard from that distance. She said that Valerie Brock and she were talking to employee Charlie Smith who after speaking with them for a while would go over and speak to Joan Newton and Pat Humphrey and then return and speak to them. He was going back and forth. At about 10 p.m. she was approached by the lead lady, Betty Belt, and was told that supervisor Steve Mitchell wanted to see her upstairs. When she arrived upstairs, supervisors Steve Mitchell and Lois Tensley were there. Mitchell said, "Connie, we're sending you home." Beavers said, "For what?" Mitchell responded, "Joan and Pat are very upset so we're sending you home until further investigated." Beavers replied, "Well, what am I supposed to do? How will I know when to come back to work?" Mitchell said, "You call in Thursday at 9:00 and ask to speak to Bill Auvil." Whereupon, the guard was summoned and he escorted her out of the plant.

Thursday morning at 9:00, Beavers called Bill Auvil, personnel manager as she was instructed. Auvil told her to call back Friday afternoon at 12; that they were still investigating. On Friday the 23rd, at about 11:30 a.m., production manager Bobby McFarland phoned and asked her to appear at the plant; they wanted to hear her side of the story. Beavers arrived at

the plant at about 2:30 that afternoon and was directed to McFarland's office. Present were McFarland and Steve Mitchell. McFarland said, "Connie we're ready to hear your side of the story now." Beavers told her side of the story and when she finished McFarland said, "Is that all you have to say?" She replied, "Yes sir, that's the way that I remembered it." McFarland asked Mitchell if he had any questions. Mitchell replied that he had none. McFarland then opened his desk drawer, removed two yellow slips and placed them on the table. When Beavers asked what they were McFarland told her that one was for her harassing and badgering an employee and the other for vicious and malicious false statements about a fellow employee. Beavers said, "Well, you've already had your mind made up to fire me before you even heard my side of the story." McFarland responded that he wanted to give her a fair chance. Beavers said, "You call it fair when you've already got your yellow slips made up? You haven't even heard the first word from me." McFarland replied, "Well, we went over the case real well and we both decided that you deserve a yellow slip for each incident."

Concerning the latter incident, Charlie Smith testified that on the evening in question he was in conversation with Connie Beavers and that Connie was telling him and Valerie Brock about employee Paul Satterly and Pat Humphrey. She said that they had a date at 3 or 4 o'clock in the morning after work and that he tried to have sex with her and she refused him. Smith said that Connie also said, "What else would you expect if someone asked you out at 3 or 4 o'clock in the morning. What else do you expect? You know that's what they want to do." He said that Beavers was talking about the people who go tell about the Union and "stuff like that that ought to have their butt kicked." He said that Beavers also told him that she "wouldn't touch Pat Humphrey with a 10 foot pole because she was scared she might have VD."

Pat Humphrey testified that she learned of the conversation between Beavers and Smith from Joan Newton. Newton told her that Connie Beavers told Charlie Smith that she, Pat

Humphrey, was "playing up to Paul Satterly and that when I went out with him I wouldn't even let him kiss me. And she just, you know, was talking about me and everything. So I went up and told Steve Mitchell about it." Humphrey further testified that while she was sitting in Mitchell's office, Mitchell called Charlie Smith to the office and he told Mitchell what Beavers had said.[6] Bob McFarland testified that the incidents were reported to him and he instructed the plant manager to make an investigation. He said that following the investigation he asked that two separate written warnings be drawn up for Beavers. He said that they were written up and he put them in his desk drawer. He stated further that when he spoke to Connie Beavers he told her that if she could bring him proof or witnesses that pointed out that she did not do what she was accused of, the written warnings would be torn up, but she had nothing to say about that. When McFarland was asked whether Pat Humphrey or Joan Newton were given written warnings he replied in the negative and stated that he had no facts showing that they were at fault.[7]

Supervisor Steve Mitchell testified that on the Friday that Connie Beavers was fired, Bob McFarland, Jim Jeffries, Bill Auvil and he discussed whether to issue one written warning or two. He said that the decision was to issue two written warning slips. When asked who suggested that the two warnings be given Mitchell said, "Bob McFarland."[8]

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[6] Pat Humphrey admitted that she did in fact go out with Paul Satterly but that she was separated from her husband at that time.

[7] With respect to the first incident, McFarland did admit that Nancy Caudill did report to him that Joan Newton used the foul language referred to above.

[8] Connie Beavers was terminated on March 23 for receiving three yellow written warnings within 12 months as per Respondent's policy requiring the automatic termination of any and all employees receiving three written warnings in 12 months. Beavers received her first warning slip for excessive absenteeism on January 31. Her second warning slip for harassing and badgering a fellow employee on March 19 and her third and final warning slip for making false and malicious

Discussion and Conclusions

This is a case involving a typical union organizational drive in which some of the more active employees attempted to get their fellow employees to sign union authorization cards and while so doing they may have violated a Company rule and were discharged ostensibly for such violation. The question to be resolved here is whether the Respondent reprimanded and discharged employee Connie Beavers for violating Company rules (receiving 3 written reprimands or written warnings within a 12 month period) without regard to her union activity or whether she was discharged because of her union activity.

The fact that employees Connie Beavers and Nancy Caudill had been engaged in union activity is undisputed.[9] Likewise, the fact that Connie Beavers used profanity in her conversation of the morning of March 19 is not in dispute. However, many other employees including Joan Newton and Pat Humphrey used profanity in their conversations in the plant both while on duty and off duty. Indeed, Joan Newton's profanity matched that of Beavers' in their March 19 early morning

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statements about a fellow employee also on March 19. Beavers admits her first warning slip was not because of her Union activity. It is especially noted that the first conversation of March 19 took place after working hours in a nonworking area and the second conversation occurred at the beginning of the shift at 6 p.m. on the same day, March 19. Respondent's contention that they occurred on March 18 and March 19 is rejected. Even though the confrontation occurred at the end of the shift and the second episode occurred during the next working period on the same day, I consider the second matter a continuation of the first and not two separate infractions calling for two separate written warnings regardless of *the merits* of Respondent's action. I am convinced that Respondent was bent on discharging Beavers and the decision to issue two warnings for what was essentially one event was based on providing three reprimands within a twelve month period, thus making her discharge automatic.

[9] As previously indicated, Pat Humphrey did not know of any employees besides Beavers and Caudill who engaged in union activity.

conversation leading to the reprimand and discharge of Beavers. Joan Newton was an instigator who interfered with Connie Beavers while she was trying to get fellow employee Pat Humphrey to sign a union authorization card in a nonworking area and on nonworking time. Neither Newton nor Humphrey received written warnings for their behavior on the morning of March 19 although Newton's language was as profane as Beavers'.

Pat Humphrey's (admission by Humphrey) fight with employee Linda Hahn in the parking lot of the company at which time Humphrey called Hahn a "whore" and accused her of "shacking up" was certainly a more serious confrontation ("slugging it out") than that which occured in the locker room on the morning of March 19. Yet Respondent, in that situation, gave warning slips to both employees rather than singling out one as it did in the case of Beavers. I suspect the apparent equal treatment by Respondent in that case resulted from the absence of union activity as a factor.

Respondent exaggerated the effect of the March 19 morning conversation on Humphrey and Newton by claiming that they were very upset. Just a few hours after that episode Humphrey and Newton were about to give Beavers a ride to work but continued on without her when they did not see her at the appointed place and time. Newton and Humphrey couldn't have been very upset if according to Humphrey they were prepared to give Beavers a ride as previously scheduled if she had been there. I conclude that Beavers, Humphrey and Newton, who had been fairly close associates were accustomed to using profanity in their everyday communications. Respondent was aware of the widespread use of profanity among its employees as a common everyday occurrence. Respondent's own exhibits demonstrated its awareness. The exhibits consisted for the most part of written warnings to several employees for using profanity in the shop. However, the issue is not whether or not Respondent condoned profanity among its employees but whether it discriminated against a particular employee who used profanity by punishing that employee to the

exclusion of others using profanity in the same incident because that employee was soliciting union authorization cards at that time. I do not consider that Beavers' conduct on the morning of March 19 could be characterized as "harassing and badgering another employee to do something against her will;" the facts simply do not support that characterization. It is evident that Connie Beavers was singled out and treated discriminatorily, *vis-a-vis* Newton and Humphrey. Respondent seized upon the alleged profanity used by her as a pretext to cover the real reason for the discharge of Beavers; namely, her support for and activites on behalf of the Union. *Shattuck Denn Mining Corporation (Iron King Branch)*, 151 NLRB 1328 (1965), enfd. 362 F.2d 466 (9th Cir. 1966).

As for the warning Beavers was issued on the evening of March 19 "for making vicious and malicious statements" about a fellow employee, the facts do not support that charge either. Although Connie Beavers' discussion with employee Charlie Smith concerning the behavior of Pat Humphrey and Paul Satterly is neither proper nor acceptable, the statements were not untrue[10] and appeared to be of the type that everyone at some time or other is subjected to because of sometimes unavoidable social and business contacts. Reputations, good or bad, are formed on the basis of such discussions conducted out of the presence of the subject. Such talk is especially vicious and malicious when it is false. Moreover, the conversation between Beavers and Smith out of hearing range of Newton and Humphrey did not, nor was it intended to, reach the ears of either. It was Newton's troublemaking tendencies or "instigating propensities" that caused Charlie Smith to reveal, what Beavers had said, to Newton and later to Humphrey and supervisor Mitchell. Again, nothing would have come of the incident if Newton had not interfered.

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[10] Pat Humphrey admitted dating Paul Satterly on the occasion in question.

As for Respondent, it appears that it seized upon this second and otherwise personal matter to come up with the needed "two more warnings" to make a total of three to justify, under its own rules, the automatic discharge of Beavers. The fact that Respondent discussed whether to issue one or two warnings among its supervisors reveals that even Respondent considered the Beavers-Smith conversation of the evening of March 19 but a continuation of the 4:30 a.m. March 19 incident. One warning would have been more appropriate but only one warning would not have given Respondent the required three warnings to effect an immediate discharge. Thus, the decision to issue two provided the vehicle for the instant discharge of Beavers.

I find that Respondent's entire conduct in this matter was illegally motivated. The warnings and discharge of Connie Beavers was because of her union activity and not for the reasons given by Respondent, which I find to be pretextual.

Conclusions Of Law

1. Florida Tile Company, Division of Sikes Corporation is an employer within the meaning of Section 2(2) of the Act, engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. United Steelworkers of America, AFL-CIO-CLC, is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent issued written reprimands to employee Connie Beavers because of her sympathy for, membership in or activities on behalf of the Union.

4. Respondent discharged employee Connie Beavers because of her sympathy for, membership in or activities on behalf of the Union.

5. Respondent discriminated in regard to hire and tenure of employment of its employees by said reprimands and discharge and engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) and (3) of the Act.

6. Respondent interfered with, restrained and coerced, and is interfering with, restraining and coercing its employees in the exercise of rights guaranteed in Section 7 of the Act.

The Remedy

Having found that Respondent has committed certain unfair labor practices it will be recommended that Respondent be ordered to cease and desist therefrom and take certain affirmative actions necessary to effectuate the purposes of the Act.

I have found that Respondent reprimanded and discharged Connie Beavers in violation of the provisions of Section 8(a)(3) and (1) of the Act. I shall therefore recommend that Respondent make Connie Beavers whole for any loss of pay for which she has suffered as a result of the discrimination practiced upon her. The backpay provided herein with interest thereon is to be computed in the manner prescribed in *F. W. Woolworth Company*, 90 NLRB 289 (1950) and *Florida Steel Corporation*, 231 NLRB 651 (1977). I shall also recommend that Respondent expunge from its personnel records all references to the two written reprimands issued to employee Connie Beavers on or about March 23, 1979.

Upon the basis of the foregoing findings of fact and conclusions of law, and upon the entire record in this proceeding, and pursuant to Section 10(c) of the Act, I hereby recommend the following:[11]

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[11] In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

Order

The Respondent Florida Tile Company, Division of Sikes Corporation, its officers, agents, successors and assigns, shall:

1. Cease and desist from:

(a) Issuing written reprimands to its employees because of said employees' membership in, sympathy for and/or activities on behalf of the Union.

(b) Discharging its employees and failing and refusing to reinstate them to their former positions of employment because of said employees' membership in, sympathy for or activities on behalf of the Union.

(c) In any like or related manner interfering with, restraining or coercing employees in the exercise of rights guaranteed in Section 7 of the Act.

2. Take the following affirmative actions necessary to effectuate the policies of the Act:

(a) Offer Connie Beavers immediate and full reinstatement to her former position or, if such position no longer exists, to a substantially equivalent position, without prejudice to her seniority or other rights and privileges, and make her whole for any loss of earnings suffered by her as a result of her discharge in the manner set forth in the section herein entitled "The Remedy."

(b) Expunge from the personnel records of Connie Beavers the written reprimands issued to her on or about March 23, 1979.

(c) Preserve and make available to the Board or any of its agents upon request all records necessary to analyze the amount of backpay due under the terms herein.

(d) Post at its office and place of business at Lawrenceburg, Kentucky copies of the attached notice marked

"Appendix."[12] Copies of said notice on forms provided by the Regional Director for Region 9, after being duly signed by Respondent's authorized representatives, shall be maintained for 60 consecutive days thereafter in conspicuous places, including all places where notices to employees are customarily posted. Respondent shall take reasonable steps to insure that said notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director for Region 9 in writing within 20 days of this Order what steps the Respondent has taken to comply herewith.

Dated, Washington, D.C. September 5, 1980

/s/ George Norman
Administrative Law Judge
GEORGE NORMAN

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[12] In the event the Board's Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

APPENDIX

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD

AN AGENCY OF THE UNITED STATES GOVERNMENT

After trial in which all parties have had a chance to give evidence and to state their positions, it has been found that we, FLORIDA TILE COMPANY, DIVISION OF SIKES CORPORATION, have violated the National Labor Relations Act, as amended, and we have been ordered to post this notice and to abide by the following:

WE WILL NOT issue written reprimands to our employees because of their membership and sympathy for or activities on behalf of the Union.

WE WILL NOT discharge our employees and thereafter refuse to reinstate them to their former positions of employment because of their membership in, sympathy for and/or activities on behalf of the Union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their rights to self-organization, to form, join, or assist UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC, or any other labor organization, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any or all such activities.

WE WILL offer CONNIE BEAVERS immediate and full reinstatement to her former position or, if such position no longer exists, to a substantially equivalent position, without prejudice to her seniority or other rights and privileges and make her whole for any loss of earnings suffered by her plus interest as a result of her termination.

WE WILL expunge from our personnel records all references to the two reprimands issued to CONNIE BEAVERS on or about March 23, 1979.

FLORIDA TILE COMPANY, DIVISION OF SIKES CORPORATION

(Employer)

Dated _____ By _____
(Representative) (Title)

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office. Federal Office Building - Rm. 3003, 550 Main Street, Cincinnati, OH 45202, Telephone 513-684-3663.

APPENDIX D

Nos. 81-1402, 81-1467

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD,
Petitioner, Cross-Respondent,
v.
FLORIDA TILE COMPANY,
Respondent, Cross-Petitioner.

FILED
FEB 7 1983
JOHN P. HEHMAN, Clerk

ORDER DENYING PETITION FOR REHEARING

Before ENGEL and KEITH, Circuit Judges, and PHILLIPS, Senior Circuit Judge.

The Majority of the judges of the court in regular active service having not favored rehearing en banc, the petition for rehearing has been referred to the hearing panel for disposition.

Upon consideration, it is ORDERED that the petition for rehearing be and hereby is denied.

Entered by order of the court.

/s/ John P. Hehman
CLERK
JOHN P. HEHMAN

Office-Supreme Court, U.S.
FILED
SEP 9 1983
ALEXANDER L. STEVAS,
CLERK

No. 82-1825

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

FLORIDA TILE COMPANY,
DIVISION OF SIKES CORPORATION,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

SUPPLEMENTAL BRIEF OF FLORIDA TILE COMPANY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-1825

FLORIDA TILE COMPANY,
DIVISION OF SIKES CORPORATION,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

SUPPLEMENTAL BRIEF OF FLORIDA TILE COMPANY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

Petitioner, Florida Tile Company ("Florida Tile"), submits this supplemental brief in support of its petition for a writ of certiorari filed in this Court on May 9, 1983. This brief is intended solely to call attention to the impact of this Court's decision in *NLRB* v. *Transportation Management Co.*, 103 S. Ct. 2469 (June 15, 1983) on the pending petition.

In its petition, Florida Tile contended that the Court's decision in *Transportation Management* would "bring order out of the burden of proof chaos" which had existed in cases under Section 8(a)(3) of the National Labor Rela-

tions Act ("NLRA") involving an examination of an employer's motive for an alleged discriminatory discharge or adverse personnel action (Pet. 10, 27). The Court's decision confirms Florida Tile's contention. The legal and factual analysis in *Transportation Management* provides additional support for the granting of the petition in this case.

1. Although the legal issue in *Transportation Management* concerned the burden of proof in Section 8(a)(3) cases where the National Labor Relations Board ("NLRB") finds that an employer had both a "good motive" and a "bad motive" for a personnel action, the Court—as anticipated in our petition—also discussed the appropriate burden of proof in the "pretext" situation where, as here, "the issue is whether illegal or legal motives, but not both, were the 'true' motives behind the decision." 103 S. Ct. at 2473 n.5.

The Court in *Transportation Management* made clear that at all times in a Section 8(a)(3) proceeding, the burden of proof stays with the NLRB General Counsel to prove that an employer's legitimate, non-discriminatory reasons for a personnel action are pretextual. The Court stated as follows:

> The Board has not purported to shift the burden of persuasion on the question of whether the employer fired Santillo [the employee] at least in part because he engaged in protected activities. The General Counsel satisfied his burden in this respect and no one disputes it. Thus, *Texas Department of Community Affairs* v. *Burdine*, 450 U.S. 248 . . . (1981), is inapposite. In that case, which involved a claim of racial discrimination in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, the question was who had "[t]he ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff. . . ."

> 450 U.S. 253. . . . The Court discussed only the situation in which the issue is whether either illegal or legal motives, but not both, were the "true" motives behind the decision. It thus addressed the pretext case.

103 S. Ct. at 2473 n.5.

The Court's treatment of pretext in *Transportation Management* leaves no doubt that the NLRB General Counsel has the burden of persuasion on that issue. As stated in our petition, the "Court should grant review in this case to make clear that the confusion surrounding the burden of proof question has not been limited solely to pure 'dual motive' cases but [has extended] to all Section 8(a)(3) cases implicating employer motivation, including 'pretext' cases" (Pet. 18).

2. The facts stressed by the Court in *Transportation Management* highlight the differences between that case and this one and emphasize the need for the judgment in this case to be reviewed according to the proper burden of proof standard. The Court in *Transportation Management* stated, *inter alia*, as follows:

> At least two of the transgressions that purportedly would have in any event prompted Santillo's discharge were commonplace, and yet no transgressor had ever before received any kind of discipline. Moreover, the employer departed from its usual practice in dealing with rules infractions; indeed, not only did the employer not warn Santillo that his actions would result in being subjected to discipline, it never even expressed its disapproval of his conduct.

103 S. Ct. at 2476.

By contrast, in this case, Florida Tile's decision to discharge Connie Beavers did not constitute a departure from its normal practice in dealing with rules infractions.

Prior to Beavers' discharge, Florida Tile had discharged employees in circumstances similar to those involving Beavers' discharge (Pet. 25-26; JA-597-608). Further, the company conducted a full and fair investigation of the events that culminated in Beavers' discharge (Pet. 6-7). Finally, unlike the employee's commonplace practice in *Transportation Management* of leaving keys in a bus that the employer seized upon as grounds for discharge, Beavers' excessive and vicious sexually-charged profanity that led to her discharge was uttered in a manner which witnesses testified had never been seen or heard at Florida Tile's plant (Pet. 5, 25-26 & n.22).

Under the burden of proof allocation delineated and clarified in *Transportation Management*, Florida Tile's discharge of Connie Beavers was not discriminatory within the meaning of Section 8(a)(3) of the NLRA. If Florida Tile's case were before the court of appeals for the first time, a different result would obtain in light of *Transportation Management*. Therefore, we respectful-

ly urge this Court to vacate the judgment below in light of *Transportation Management* (Pet. 27). Florida Tile respectfully prays that a Writ of Certiorari be granted.

Respectfully submitted,

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No. 82-1825

In the Supreme Court of the United States

OCTOBER TERM, 1982

FLORIDA TILE COMPANY, DIVISION OF SIKES CORPORATION, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTION PRESENTED

Whether substantial evidence supports the finding of the National Labor Relations Board that petitioner reprimanded and discharged an employee because of her union activity and not for the reasons advanced by petitioner.

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OPINIONS BELOW

The order of the court of appeals (Pet. App. 1a-2a) is reported at 692 F.2d 34. The decision and order of the National Labor Relations Board (Pet. App. 3a-21a) are reported at 255 N.L.R.B. 360.

JURISDICTION

The judgment of the court of appeals was entered on November 2, 1982. A petition for rehearing was denied on February 7, 1983 (Pet. App. 22a). The petition for a writ of certiorari was filed on May 9, 1983 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, 29 U.S.C. 151 *et seq.*, are set forth at Pet. 2-3.

STATEMENT

1. Petitioner is engaged in the manufacture and distribution of tile. Connie Beavers was employed as a tile sorter at petitioner's Lawrenceburg, Kentucky plant from November 12, 1977, until her discharge on March 23, 1979. In January 1979,[1] Beavers became involved in an organizational campaign on behalf of the United Steelworkers of America, wearing a union button at work, passing out union pamphlets, and securing signatures of her fellow employees on union authorization cards (Pet. App. 6a-7a; A. 74-77).[2]

On Monday, March 19, at about 4:30 a.m., after they had completed working the third shift (6 p.m. to 4:30 a.m.), Beavers and another employee, Nancy Caudill, were soliciting signatures on union authorization cards in the women's locker room. When they asked employee Pat Humphrey if she would sign a card, Humphrey expressed some reluctance, explaining that her husband did not want her to sign. Nevertheless, on further urging, Humphrey took a card and knelt down with a pen in her hand when another employee, Joan Newton, walked in and advised Humphrey not to sign the authorization card. Beavers protested the intervention, vulgar remarks were exchanged, and Humphrey and Newton left without signing the cards (Pet. App. 7a-9a; A. 77-78, 80, 175-177, 386-387, 394-395, 419).

Notwithstanding this interchange, Humphrey and Newton, who were in a car pool with Beavers, planned to drive Beavers to work Monday night, but they missed connections and Beavers drove herself (Pet. App. 9a; A. 81, 389-390). In the meantime, Humphrey and Newton had reported their argument with Beavers over the union card to the shift supervisor. At the beginning of the Monday night shift,

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[1] All dates refer to 1979 unless otherwise indicated.

[2] "A." refers to the appendix in the court of appeals.

Humphrey, Newton and the supervisor went to discuss the matter with the production manager, who in turn summoned the plant manager (A. 258-262, 360-364, 390, 420-421).

On the production line that night, Beavers complained to her co-workers, Valerie Brock and Charlie Smith, that "people who go tell about the Union and 'stuff like that ought to have their butt kicked' " (Pet. App. 11a; A. 344, 346, 356-357). Beavers also said that Humphrey had been playing up to employee Paul Satterly and had gone on a date with him at 3 or 4 in the morning, but that, when Satterly had made sexual advances, Humphrey had resisted them (Pet. App. 11a-12a; A. 343-344, 346).[3] Beavers also asked Charlie Smith, who was friendly with Humphrey, if he thought Humphrey was "all right." He answered that he thought she was "pretty good," and Beavers replied that she " 'wouldn't touch Pat Humphrey with a 10 foot pole because she was scared she might have VD' " (Pet. App. 11a; A. 345).

The conversation between Beavers and her co-workers was not within hearing range of Newton or Humphrey (Pet. App. 10a, 15a; A. 87-88). Smith, however, relayed Beavers' remarks to Newton and Newton reported them to Humphrey, who again complained to the shift supervisor (Pet. App. 10a-12a; A. 88, 364-366, 428-429). Beavers was then summoned to the supervisor's office and told that Humphrey and Newton were very upset and that she was suspended and should go home while the matter was being investigated. Beavers was not asked for her version of the incidents, and she was escorted out of the plant by a guard (Pet. App. 10a; A. 89-90, 367).

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[3]Humphrey acknowledged that she had gone on a date with Satterly (Pet. App. 12a n.6; A. 410).

On Tuesday, Wednesday and Thursday of that week, petitioner's production manager and plant manager took a total of 11 written, witnessed and notarized statements about the events of Monday from Humphrey, Newton, and four other people, including the shift supervisor (A. 265-266, 272-273, 292-294, 530-538, 540-541). No statement was taken from Beavers or Caudill, the other pro-union employee, during this three-day period. On Friday morning, Production Manager Bob McFarland finally took a statement from Caudill, in which she told him that Newton also had used vulgar language during the locker room exchange with Beavers (Pet. App. 12a n.7; A. 325-326, 539). Later that day, McFarland telephoned Beavers and told her to report to the plant because "they want[ed] to hear * * * [her] side of the story now" (Pet. App. 10a; A. 92-93).

After Beavers had appeared and had given her version of the story to McFarland and the shift supervisor, McFarland opened his desk drawer, removed two yellow warning slips, and placed them on the desk (Pet. App. 11a; A. 93-94). One warning slip was for "harassing & badgering another employee to do something against her will" and the other was for "making vicious & malicious statements about a fellow employee" (Pet. App. 11a; A. 94, 519-520). When Beavers protested that McFarland already had made up his mind to fire her before he had even heard her side of the story, McFarland replied, " 'Well, we went over the case real well and we both decided that you deserve a yellow slip for each incident' " (Pet. App. 11a; A. 94-95).[4] No other employee was disciplined for participating in the events of March 19 (Pet. App. 14a).

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[4]Under company policy, three yellow warning slips in one year result in automatic discharge of the employee (Pet. App. 12a n.8; A. 43). Since Beavers previously had received a yellow warning slip for absenteeism, the effect of petitioner's giving her two warning slips for the Monday incidents was to discharge her (Pet. App. 12a n.8; A. 127-128, 571).

2. The Board, adopting the decision of the Administrative Law Judge, held that petitioner had violated Section 8(a)(1) and (3) of the Act by reprimanding and discharging Beavers because of her union support and activities (Pet. App. 3a-19a). The Board concluded that the reasons advanced by petitioner for the discipline — " 'harassing and badgering another employee to do something against her will' " and " 'making vicious and malicious statements' about a fellow employee" (*id.* at 15a) — were pretextual (*id.* at 13a-16a).

In finding that petitioner's true motive was anti-union, the Board noted (Pet. App. 13a & n.8) that, in the first incident, Beavers was engaged in the protected, concerted activity of soliciting union authorization cards after working hours in a nonworking area. The Board held that Beavers' conduct on that occasion could not properly be characterized as "harassing and badgering another employee against her will" (*id.* at 15a),[5] observing that, although Beavers concededly had used profanity, such language was in widespread, everyday use in the plant and that petitioner had not disciplined Newton although it knew that she had used similar language during the same confrontation (*id.* at 13a-14a). The Board also noted that when Humphrey and a fellow employee had engaged in a much more serious confrontation on another occasion, which had resulted in the two employees "slugging it out" on the ground in the parking lot, petitioner had given both employees warning slips,

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[5]Although the Board found that petitioner was motivated solely by anti-union considerations, rather than by any concern for Beavers' treatment of Humphrey, it is clear that Beavers' conduct was not so outrageous as to exceed the bounds of protected activity under the Act. Hence, even if the profanity Beavers employed in soliciting signatures on the union cards had been the real reason for petitioner's discharge of her, it would have been an unlawful basis for that discipline. See *NLRB* v. *Cement Transport, Inc.*, 490 F.2d 1024, 1030 n.7 (6th Cir.), cert. denied, 419 U.S. 828 (1974), and cases cited therein.

"rather than singling out one as it did in the case of Beavers" (*id.* at 14a, 15a; A. 401-402, 413-414, 569-570). The Board concluded (*id.* at 14a) that "the apparent equal treatment by [petitioner] in that case resulted from the absence of union activity as a factor."

In addition, the Board found that the separate warning petitioner gave Beavers for "making vicious and malicious statements" represented an attempt by petitioner to elevate what was really a continuation of the same quarrel into an independent ground for discharge (Pet. App. 15a-16a). It observed (*id.* at 15a & n.10) that Beavers' remarks about Humphrey and co-worker Satterly were not alleged to be untrue and "appeared to be of the type that everyone at some time or other is subjected to because of sometimes unavoidable social and business contacts"; that Beavers' remarks were made to other co-workers, out of hearing range of Newton and Humphrey; and that nothing would have come of the comments if Newton had not learned of them and repeated them to Humphrey (*id.* at 15a). The Board accordingly concluded (*id.* at 16a) that petitioner's "entire conduct in this matter was illegally motivated" and that the warnings and discharge of Beavers were "because of her union activity and not for the reasons given by [petitioner]."

3. The court of appeals affirmed the Board's findings and enforced its order (Pet. App. 1a-2a). It noted (*ibid.*) the company rule that authorized the discharge of an employee who received three disciplinary slips in one year; that Beavers had received only one disciplinary slip before the union campaign began; and that, after Beavers had become active in the campaign, she had received two disciplinary slips at the same time, arising out of incidents that had occurred on the same day. The court further observed (*id.* at 2a) that both incidents had involved the use of profanity and found it "significant that two other employees, Ms. Joan Newton

and Ms. Pat Humphrey, who opposed the Union and had used profanity in making derogatory statements, were not disciplined by the Company." The court concluded that this disparate treatment supported the Board's finding of unlawful motivation (*ibid.*).

ARGUMENT

Contrary to petitioner's contention (Pet. 9-10), this case does not present "a significant practical question concerning the proper allocation * * * of proof in Section 8(a)(3) cases" subsumed in the *Wright Line*[6] issue that is currently pending before this Court in *NLRB* v. *Transportation Management Corp.*, No. 82-168 (argued Mar. 28, 1983). Under the *Wright Line* test, if the Board's General Counsel has established that opposition to an employee's protected activities was "a 'motivating factor' " in the employer's decision to discharge the employee, the employer can prevail only by showing by a preponderance of the evidence that it would have taken the same action "even in the absence of the protected conduct." 251 N.L.R.B. 1089 (footnote omitted). The First Circuit rejected the *Wright Line* test insofar as it places on the employer the burden of proving, rather than merely producing evidence, that it would have taken the same action for legitimate reasons. *NLRB* v. *Wright Line, a Division of Wright Line, Inc.*, 662 F.2d 899, 904-905 (1981), cert. denied, 455 U.S. 989 (1982). Accord, *NLRB* v. *Transportation Management Corp.*, 674 F.2d 130 (1st Cir. 1982), cert. granted, No. 82-168 (Nov. 15, 1982).

The burden-shifting aspect of the Board's test, which is at issue in *Transportation Management*, however, applies only where it has been shown that the employer has two

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[6] *Wright Line, a Division of Wright Line, Inc.*, 251 N.L.R.B. 1083 (1980), enforced, 662 F.2d 899 (1st Cir. 1981), cert. denied, 455 U.S. 989 (1982).

motives, one lawful and one unlawful.[7] Here, by contrast, the Board found that petitioner's sole motive was anti-union and that the reasons advanced by petitioner for the discipline were mere pretexts. Contrary to petitioner's assertion (Pet. 24), the Board did not arrive at this conclusion by requiring petitioner to "prove, by a preponderance of the evidence, that it was actually motivated by the reasons advanced." Rather, as in the typical Board proceeding described in the Board's reply brief in *Transportation Management* (at 3), the General Counsel attempted to prove both that petitioner had discharged Beavers for an unlawful reason and that petitioner's proffered legitimate reasons were pretextual. The Board and the court of appeals sustained both contentions; and there is no indication in the decision of either that it did so by placing the burden on petitioner to prove that its proffered reasons were not pretextual (see Pet. App. 1a-2a, 13a-16a). Consequently, the court of appeals had no occasion to address the issue that is pending before this Court in *Transportation Management* — whether the Board may place on an employer that has both a lawful and an unlawful motive for imposing discipline the burden of proving that it would have taken the same action even absent the unlawful motive.

This case thus is no different from numerous other cases in which the courts of appeals have concluded that the Board's findings of unlawful discrimination should be sustained irrespective of the validity of the burden-shifting aspect of the Board's *Wright Line* test. For example, although the First Circuit has expressed disagreement with that feature of *Wright Line*, it nonetheless has affirmed

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[7]Indeed, in *Wright Line* itself the First Circuit enforced the Board's order because it agreed that the alleged legitimate reason for the discharge in that case was a pretext. *NLRB* v. *Wright Line*, *supra*, 662 F.2d at 907 n.13.

Board findings of anti-union discrimination where the Board did not decide the case "upon the niceties of burdens of proof" but, rather, "found evidence of anti-union motive and then went on to find that the employer's allegedly legitimate reason for the discharge was a pretext." *NLRB* v. *Magnesium Casting Co.*, 668 F.2d 13, 16 (1st Cir. 1981). Accord, *NLRB* v. *Steinerfilm, Inc.*, 669 F.2d 845, 850-851 (1st Cir. 1982).[8] This Court recently has declined to review three such cases, in which the petitioners had contended that the Board's conclusion that their assertedly legitimate reasons for the challenged discipline were pretextual involved an application of the Board's *Wright Line* test. *American Geri-Care, Inc.* v. *NLRB*, cert. denied, No. 82-1456 (Apr. 25, 1983); *Brewton Fashions, Inc.* v. *NLRB*, cert. denied, No. 82-1209 (Apr. 4, 1983); *Pettibone Corp.* v. *NLRB*, cert. denied, No. 81-2116 (Oct. 4, 1982).

Accordingly, the only issue that is presented by the petition is whether substantial evidence supports the Board's conclusion that petitioner's asserted lawful reasons for the discharge were pretextual and that its true motive was unlawful. That evidentiary issue does not warrant further review. *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 491 (1951).

In any event, the court of appeals properly concluded that the Board's findings were supported by substantial evidence. Petitioner's discharge of Beavers arose out of an

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[8]See also *Royal Development Co.* v. *NLRB*, 703 F.2d 363, 370-372 (9th Cir. 1983); *Marathon LeTourneau Co.* v. *NLRB*, 699 F.2d 248, 252 & n.3 (5th Cir. 1983); *NLRB* v. *American Geri-Care, Inc.*, 697 F.2d 56, 63-64 (2d Cir. 1982), cert. denied, No. 82-1456 (Apr. 25, 1983); *L & M Radiator, Inc.* v. *NLRB*, 696 F.2d 76 (8th Cir. 1982); *Standard-Coosa-Thatcher Carpet Yarn Division, Inc.* v. *NLRB*, 691 F.2d 1133, 1142-1143 nn.9 & 10 (4th Cir. 1982), cert. denied, No. 82-1261 (Apr. 18, 1983); *NLRB* v. *Carbonex Coal Co.*, 679 F.2d 200, 204 (10th Cir. 1982).

incident involving protected union activity (*supra*, page 5 & note 5); she was singled out for discharge although an anti-union employee had used comparably profane language on the same occasion and although such language was commonplace in the plant (*supra*, pages 5-6);[9] and petitioner's investigation of Beavers' conduct was slanted to document a basis for discharging her and to overlook the other employee's conduct (*supra*, pages 4, 6).[10] In these

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[9]Petitioner's assertion (Pet. 25-26 n.22) that "all the witnesses present in the locker room on the morning of March 19 * * * uniformly agreed that they had never heard an employee use such vicious profanity in the flagrantly hostile and intimidating fashion that Beavers employed on that morning" is misleading. Employee Caudill, who was a witness to the confrontation in the locker room, credibly testified that she was not embarrassed by the language used, as she "hear[d] that [around the plant] everyday" (A. 184-185, 190-192). Caudill's testimony concerning the prevalence of the use of such language in the plant was corroborated by that of other witnesses (A. 98-100, 229, 354), which also was credited by the Board (Pet. App. 13a-15a). Moreover, although Humphrey initially testified that it was "the first time" she had "ever heard anyone cuss somebody like that" (A. 400), she conceded on cross-examination that she had called another employee a "whore" in retaliation for an epithet the employee had applied to her and that she also had accused the other employee of "shacking up" (Pet. App. 14a; A. 401-402, 413). Similarly, although Newton had testified that "people just don't cuss people like * * * [Beavers] did" on that occasion (A. 434), the Board credited testimony that Newton, on the same occasion, had told Beavers to shut her "fucking mouth" (Pet. App. 9a & n.4; A. 78, 177).

[10]Although Production Manager McFarland testified that he had no facts showing Newton or Humphrey to be at fault, he admitted that Caudill had told him about Newton's use of profanity (Pet. App. 12a & n.7; A. 308, 325-326). McFarland asserted, however, that he was unable to question other employees concerning Caudill's report because her statement was taken last (A. 325-326). In further contrast to its treatment of Beavers, petitioner merely counseled two employees who, on another occasion, had a confrontation that involved physical contact as well as a verbal threat (A. 207-210, 224-228, 458-460).

Petitioner's attempt to defend its conduct in this case by asserting (Pet. 26) that, "prior to Beavers' discharge, it had discharged a pro-company employee while retaining a pro-union employee," cannot

circumstances, the Board reasonably concluded that petitioner had seized upon the occasion of Beavers' dispute with Humphrey and Newton as an excuse for issuing two warning slips to Beavers, thus triggering the automatic discharge of a vigorously pro-union employee (Pet. App. 13a-16a).

CONCLUSION

The petition for a writ of certiorari should be denied.

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succeed. In the incident to which petitioner apparently refers, the "pro-company employee" had struck the pro-union employee, who was asking him to sign a union authorization card (A. 282-283). Both employees were suspended during the investigation, and the pro-union employee was suspended for another week for "agitating" the other employee to sign a union card and calling him "a back stabber" (A. 283-288). In any event, "the mere fact that all union members or supporters are not discharged[] does not disprove the fact that an employee's discharge is based upon an unlawful discriminatory motive." *NLRB* v. *Challenge-Cook Brothers*, 374 F.2d 147, 152 (6th Cir. 1967).